

Jurisdiction in cyberspace

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Digital nomadism, international teleworking and disruptive work are some of the recent phenomena that have compelled lawyers and judges to broaden their approach to legal problems, adding the dimension of jurisdiction in cyberspace. The covid-19 pandemic made many changes to our accustomed models of work, and one of those changes is distance working.

Remote work, or telework as it is referred to in Brazilian labor legislation, is not itself a novelty. The Consolidation of Labor Laws (CLT – Consolidação das Leis do Trabalho) provides for it in articles 75-A to 75-E (added to the CLT in 2017 by Law 13.467), and defines "telework" (teletrabalho) as rendered work performed preponderantly away from the employer's premises, using information technology and telematics.

The CLT provided for telework well before the arrival of the covid-19 pandemic, but there is no question that distance working has become increasingly common, mainly to avoid travel in urban areas, crowds, exposure to the virus, and as a means to comply with public health measures that imposed social distancing.

In Brazil, by law almost all employees are represented by a union, and union representation is determined according to two factors: the employer's main economic activity (with the exception of certain categories of employees) and territoriality, which is usually understood to be the place where the employees' services are rendered.

Article 611 CLT, which provides for the application of collective bargaining instruments, is understood to mean that where employees render services in a place different from the employer's main establishment, the collective bargaining instrument for the specific territorial base where the employee is located should apply.

This territorial concept of union representation fails when it comes to teleworkers, because they can be hired in one place, work in another, and live in a third. Distance workers cannot be categorized according to the place where they render services because they can work remotely for their employer one or two days from one location, and then move on to another location.

Categorizing teleworkers according to the location of their employers' main establishment (i.e. the place of the employment agreement) doesn't always solve the problem, because the employer may be located in another country and if the worker is located in Brazil, Brazilian law applies.

In a country the size of Brazil, it's possible to find out-of-state, out-of-region and even international teleworkers.

The law does not contemplate these types of work arrangements, and decisions by the courts are still scarce. A new term, "de-territorialization", has

been created to express mitigation of the principle of territorialism in union representation, and the creation of a concept of cyberspace that does not take teleworkers' residential addresses to be the determining factor in deciding which collective bargaining instrument applies, since remote work can be done anywhere.

In this scenario, it's important to keep in mind that the CLT expressly provides that negotiated provisions will prevail over the law in various situations, including telework (article 611-A(VIII)). Employers and teleworkers therefore have room to agree on what will work best for both parties, and the courts' review of such negotiated arrangements will be limited to their formal aspects.

It's too early to say which position is right and which wrong, or what school of thought will prevail. These questions will certainly be much debated and disputed in the courts, which have the last word on how the law applies in each case.

***This article can be found in the e-book "**Current Employment Issues: the end of the pandemic and new ways of working**". [Click here to read the whole content.](#)*